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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1026

EUGENE WILSON TYLER,
Petitioner,
v.
TRAMMELL E. VICKERY, ET AT.,
Respondents.

RALPH BANKS, JR.,
Petitioner,
v.
TRAMMELL E. VICKERY, ET AL.,
Respondents.

JAMES E. C. PERRY, ET AL.,
Petitioners,
v.
EDWARD S. SELL, JR., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT

To the extent Petitioners' statement recites the procedural history of this case, it is accurate.

The Petitioners' statement is not sufficiently accurate or, even conceding required brevity, complete to permit a determination of whether the questions presented are sufficiently significant to warrant granting the petition. Nor does the statement accurately paraphrase the judgment below.

The fuller, more accurate statement which follows reveals that this case, while premised on serious charges, does not in its final analysis present difficult or substantial questions.

The Board of Bar Examiners, an arm of the Supreme Court, administers the Georgia Bar Examination as one of the requisites to admission to practice law in the State. The basic premise of the examination, given twice each year, is to examine an applicant's

> "knowledge of such subjects pertaining to the practice of law and pertaining to his qualification for admission as may seen advisable to the Board of Bar Examiners . . . ." Ga. Code § 9-110.

That precatory statute and the published rules of the Bar Examiners

specify the subjects which are appropriate for examination. The examination itself is composed of essay questions, a practice in which all other States almost unanimously concur, and, since February, 1972, an objective portion of multiple choice questions prepared under the aegis of the National Conference of Bar Examiners, a practice in which at least 40 other states had also joined by 1974.

The preparation of the essay questions was thoroughly explored by the petitioners' in intensive discovery conducted over almost two years. In summary, the Chairman of the Board chooses, with the informal concurrence of the Board members, the legal topics to be included on a particular examination and then assigns several topics to each examiner. Each examiner devises at least two (five prior to the February, 1972, examination) questions to be reviewed by the entire Board. The questions are designed to present hypothetical fact situations to which the applicants can apply general legal principles. The situations are usually drawn from reported cases or from problems presented to the examiners in their practice. The subjects covered are not exhaustive of the subject matter which the practice of law might encompass. Instead, the subjects covered are those which the examiners judge to be basic to the practice of law. The whole Board

meets to review the questions both for content and form and the Bar Examiners then discuss among themselves the applicants' ability to answer each question. If a question is found to be basically sound, editorial changes may be necessary to clarify the question and avoid confusing the applicants. The essay questions for the June, 1971, July, 1972 and July, 1973, examinations were presented in support of the Bar Examiners' motion for summary judgment. Petitioners' evidence did not contradict in any way the preparation of the essay portion of the examination. Petitioners' expert, a psychologist without legal training or knowledge of the field or actual practice, suggested only that "a good law professor" should review the questions to determine clarity and coverage of the "domain," but he himself had no opinion of what the "domain" might encompass.

Since February, 1972, Georgia has employed with the essay examination developed by the Bar Examiners, the Multi-State Bar Examination (MBE) which is an objective test developed by the National Conference of Bar Examiners (NCBE) along with the Educational Testing Service (ETS) of Princeton, New Jersey, recognized by petitioners' expert as probably the best in the nation. The Georgia Supreme Court authorized the Bar Examiners to count the multi-state as much as one-half of the exam, which the Bar Examiners elected to do. The multi-state exam was initially composed of five subjects -- contracts, torts, criminal law, evidence and property -- and more recently has added constitutional law. These were chosen because they were given in all jurisdictions, were

subjects which all States thought basic to the practice of law, and were subjects upon which good objective questions could be asked. The questions are composed by committees each consisting of three law professors and two bar examiners picked by the Director of Testing of the NCBE and to each of which a testing expert was assigned by ETS. Three black lawyers have been appointed to the drafting committees. Instructions have been prepared on the proper drafting of objective questions. Questions are prepared by the individual members of the committees and then sent to ETS and the NCBE Director of Testing for comments. Approximately 10 months prior to the administration of a test, each committee meets with the assigned consultant from ETS to finalize the questions and the correct answers which are agreed upon unanimously. State boards of bar examiners have the right to review the questions and make comments. The examination is then printed and distributed to the State boards for examinations in July and February. Petitioners' evidence did not in any way raise any issue about the preparation of the MBE.

The Georgia bar examination is now given in February and July. Applicants are divided alphabetically into several rooms and seated alphabetically so that attendance can be checked. The Administrative Assistant to the Board prepares numbers to be drawn by the applicant as required by rules of the Supreme Court. After drawing a number

each applicant places the number in an "A" envelope with his name on it. These envelopes are picked up by the examination monitors and placed in a large box which is sealed and then taken to the Office of the Clerk of the Georgia Supreme Court. The multi-state examination is administered on the first day and the essay exam on the second day. As an applicant completes each section of the examination, he places his paper in the appropriate "B" envelope with only his number on it which is then collected by the monitors.

After the examination is completed, the multi-state answer sheets are forwarded to ETS for scoring and each bar examiner takes the answers to the question which he prepared with him.

The multi-state portion of the exam is scored by ETS.

Each Bar Examiner grades all examinees on the questions which the examiner has devised. In grading the papers, each examiner looks for demonstration by the applicant of the minimal competence which in the examiner's judgment is a pre-requisite to admission to the bar. The critical ability which the examination is designed to test and the examiners seek in grading is the ability to recognize and analyze legal issues in the basic area which the question involves rather than knowledge of "black-letter law". Each examiner recognizes the need for consistent grading and each has a

method by which he tries to assure application of a uniform standard for all examinees. Most of the examiners read a group of papers to establish a standard and to make a tentative evaluation of whether his questions have been successful and then begins final grading. But each has a system by which he tries to make sure that he treats the first group of 20 papers like the middle 20 and last 20. Demonstrated minimum ability on the areas tested is assigned by each examiner a passing grade of 70. Demonstrated variations in that ability receive higher or lower marks, on a scale of 100, as may be warranted.

Petitioners' testing expert was not familiar with this process or any other substantive aspect of the grading process. Respondents' testing expert did not testify that judgment alone was not a satisfactory basis for setting a passing score. He testified, instead, that judgment was satisfactory as long as the judgment was reflective of the objective of the test.

The essay papers are graded by number only and the examiners testified that they did not know the identity of any applicant at the time they were grading papers. None of the examiners believe they are able to distinguish papers written by black applicants from those written by white applicants and petitioners presented no evidence that any black applicant employed a style distinctive of black persons.

After the examiners complete the individual and independent grading of the answers to the essay questions, the Board meets to determine which applicants will be certified as passing. When a total essay examination was used, the examiners regraded individual applicant's papers which were marginal. Three basic criteria for regrading were used:

1. a total score of 68
2. passing 3 out of 5 examiners
3. request by one examiner for a review

The Board regraded individual papers meeting these criteria and then certified the passing applicants. Presently, however, the essay score is combined with the multi-state score in three formulas recommended by NCBE. NCBE returns the combined scores to the Board ranked on computer printouts. The Board regrades several actual marginal essay papers and then, after debate, picks a combined score, determined by NCBE under one of the formulas recommended by NCBE, which is administratively determined by the Board to be the equivalent of 70. In July, 1972, a combined score of 68 was administratively determined to be the equivalent of 70.

During the regrading session, the Board usually begins sending numbers of passing applicants to the Administrative Assistant for correlation with the names in the "A" envelopes. The Administrative Assistant then removes the box with the "A" envelopes from the Supreme Court Clerk's office, and he

has never found the seal broken in doing so. The examiners do not learn the names of passing or failing applicants until regrading is complete. The names of those persons passing the examination are certified to the Superior Courts and all persons are notified of whether they passed or failed. A failing applicant is informed of his grade but is not permitted to review his paper after it is graded or to discuss it with an examiner.

The parties' respective experts made several analyses of the results obtained by the essay examination, the MBE, and the overall examination grading process. Each examined the results of the examination for evidence of reliability of the grading process, evaluating internal evidence for consistency of each examiner with each other examiner, of each examiner and the MBE, of the whole Board and the MBE. Each expert found substantially high evidence of reliability of the grading process, although petitioners' expert testified that the reliability should have been somewhat higher than it was in fact.

Respondents' expert also examined the results obtained for evidence of congruent validity, i.e., whether the judgments made by the bar examination were equivalent to the judgments made by law school admission test scores, law school grade point average, accredited law school graduation. He found that the bar examination generally demonstrated congruent validity.

No evidence offered by petitioners or respondents demonstrated or suggested that the grading process had an adverse impact on any applicant because of his race.

Moreover, no evidence was presented that suggested that any bar examiner or the board had been arbitrary or capricious or had not substantially and fairly exercised their judgment as to whether an applicant had demonstrated minimal competence to practice law. No evidence was presented which suggested any apparent incompetency in grading.

The only statistics prepared by the bar examiners for June, 1970, June, 1971, and July, 1972, show a steadily rising number of persons who apply for admission to the Georgia bar and also a steadily rising number of persons who pass the bar examinations. The overall pass rate was 55% in June, 1970, 57% in June, 1971, and 54% in July, 1972. Graduates of accredited law schools have consistently passed at a rate of 70% or higher, while graduates of unaccredited schools passed at a rate of 17% or lower. In July, 1973, 727 persons took the bar examination and 539 passed, which is 74%.

The number of identified black applicants taking the June, 1971, and July, 1972, examinations, which were the examinations giving rise to these lawsuits, and subsequent examinations, has been absolutely and relatively small,

and the number of identified black graduates of accredited law schools even smaller.

Analysis of performance by identified blacks demonstrates that blacks as a group succeed on the examination at a somewhat lower percentage than that demonstrated by white applicants and that blacks who are graduates of accredited law schools pass at a somewhat lower rate. Of those, however, success has to some extent been statistically tied to law school admission test scores, law school attended, and grade point average. Moreover, black applicants who have taken successive examinations and who are accredited law school graduates have generally ultimately succeeded.

Eleven black applicants, ten of them graduates of accredited law schools taking the examination for the first time, passed in June, 1971, out of a total of 33 blacks, and 4 more passed on later examinations. The total number of persons taking the June, 1971, examination was 483. Nine of the 18 remaining black applicants attended unaccredited law schools whose graduates have an overall pass rate of about 13%. Six of the nine graduates of accredited schools have not continued to take the examination and did not take it in July, 1973. In June, 1971, 62 graduates of accredited schools did not pass the examination and 13 of these were black.

A total of 542 persons took the Georgia bar examination in July, 1972, and of this number 40 were identified as black. Although no black applicant passed that examination, 17 of those passed a later examination given prior to the Bar Examiners' filing their motion for summary judgment. Of the 23 black applicants who have not passed, 12 attended unaccredited law schools and one studied in an attorney's office; 6 of those who attended accredited schools have not continued to take the bar examination. In July, 1972, 108 graduates of accredited law schools did not pass the examination and 26 of these were black. However, only one of the 40 applicants identified as black passed the MBE but failed the total examination and he passed on the succeeding examination. Undisputed testimony demonstrated that it would be impossible for any of the now 40 States using the MBE to set a passing score on the MBE so as intentionally to achieve the result of failing all or a substantial portion of black applicants. Georgia's passing score on the MBE, moreover, fell well within the range of the passing scores determined by other States also using the MBE.

The Bar Examiners keep no statistics by race. The application does not require an applicant to designate his race or to supply a picture, although the superior courts of three circuits require fingerprint records which do indicate race. The Board has no statistics showing the historical effect of the bar examination on any racial group and there is no historical fact of adverse impact on a racial group of which the defendants could have or did have knowledge.

The Board Chairman stated that he did in fact become concerned after the July, 1972 examination when he heard that no black applicants had passed. He then made a personal study of the reasons for black applicants failing the examination. The Chairman discussed the situation with NCBE to discover whether they could offer any assistance. The Chairman's assessment of the problem was that the crucial factor may have been the cut-off score on the MBE which may have affected not only blacks but other qualified applicants. On that examination, 108 graduates of accredited law schools failed the exam and of that number 26 were black. The Chairman also attributed some of the difficulty of that examination to the superior level of the whole group of applicants.

ARGUMENT

This case presents serious charges against the respondents. The petitioners charge that as Georgia Bar Examiners the respondents have intentionally discriminated against black applicants for admission to the Georgia bar, becoming so openly and carelessly brutal in that discrimination that they failed all of the 40 black applicants admitted to the July, 1972, examination. Petitioners also charge that the Georgia bar examination, intentionally or otherwise, excludes blacks from the practice of law in higher proportions than it does whites and, until the examination is scientifically determined, by methods only the petitioners have suggested, to correspond to a comprehensive analysis of the "job" of law practice, it violates the Equal Protection Clause.

On these charges, the Georgia bar examination process was exposed to the intense and extensive scrutiny of petitioners for almost two years in one case and over three in the others. By discovery, plaintiffs have delved deeply into all policies and procedures of the respondent Bar Examiners, and their "agents", and all pertinent information has been made available to them, through the Bar Examiners or otherwise. The resulting record is voluminous.

Especially given the serious charges made by petitioners, the respondent Bar

Examiners, the district court, and the court of appeals were fully cognizant of the heavy burden which the bar examiners assumed by their motion for summary judgment.

But the voluminous record, rather than obscuring any issues, amply and clearly demonstrates the absence of any substance whatsoever in petitioners' charge of racial discrimination, intentional or unintentional. That record reduces petitioners' dispute with bar examinations to a meaningless, manufactured quibble over testing theory. The judgments of both the district court and the court of appeals on that record were entirely correct. Neither judgment, once petitioners' contortions of their substance and effect are eliminated, establishes a principle that is novel, or that conflicts with the decisions of other federal courts or with the decisions of this Court.

1. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE GEORGIA BAR EXAMINATION TESTS MINIMAL KNOWLEDGE AND LEARNED ABILITY FUNDAMENTAL AND ESSENTIAL TO THE PRACTICE OF LAW AND THUS SATISFIES THE FOURTEENTH AMENDMENT.

Georgia has a clear, if not compelling interest in regulation of the practice of law, a profession so intimately bearing on the administration of justice and the life, liberty and property of its citizens. In furtherance of that

interest, Georgia is entitled, Schware v. Board of Examiners, 353 U.S. 232 (1957), if indeed it is not in some cases compelled, Tollett v. Henderson, 411 U.S. 258 (1972), to exclude from that practice those who do not demonstrate minimal competence in the essential knowledge and skills of practice.

At the same time, however, Georgia is not compelled to monitor professional performance except as improper professional performance may affect the interests of its citizens. Nor, for similar reasons, is Georgia required or able to certify that one who is admitted to practice has demonstrated competence or will in fact be competent, much less "successful", in the myriad professional undertakings which that lawyer might assume.

For those reasons, among others, the premise of Georgia's licensing procedure is that the licensed individual has reasonably demonstrated the requisite minimal competence in basic knowledge and basic learned abilities essential to the practice of law.

The basic knowledge required is knowledge in subject matters selected for essay examination by the unquestioned experts who compose the Board of Bar Examiners and who draw from real experience in the practice of law. Since February, 1972, that judgment has been confirmed by the selection for the MBE portion of subject matters deemed basic by panels of experts, selected on a

national scale, who draw upon their real and academic experience. The expressed judgment of all States and territories as to the subject matters basic to the practice of law does not significantly vary from the judgment which Georgia has made. The basic learned ability which Georgia and almost all other States deem essential is the ability to analyze fact situations in terms of basic legal principles pertinent to the problems presented and to suggest solutions based on reasoned analysis of the issues involved and reasoned application of those basic principles.

It is patently obvious, as the Court of Appeals recognized, 14a, 517 F.2d at 1101, that such basic knowledge and ability is "fundamental" and "essential" to the practice of law. Indeed, this case amply demonstrates that the ability to recognize and deal with legal principles is fundamental to the practice of law. Petitioner's counsel, as lawyers, could not have adequately interviewed their clients, engaged in legal research, or undertaken written or oral advocacy without applying, even if erroneously, to each of those undertakings, the fundamental attribute of law practice - ability to recognize and deal with legal principles and issues.

The Georgia bar examination, in both its locally-prepared essay and its nationally-prepared objective portions, is exclusively designed to and does test for the presence of that knowledge and ability which is obviously fundamental and essential to law practice.

The passing score on the essay, on the objective portions of the examination and on the combined result as well is not an immutable number of "right" answers predetermined to represent competence. It is a determination of a level which represents demonstrated minimum competence on that test.

Against the exhaustive, overwhelming and undisputed evidence of meticulous, conscientious preparation, administration and grading of the Georgia bar examination, in part by nationally selected experts and in part by experts selected by the Georgia Supreme Court, petitioners offered nothing.

Petitioners offered no evidence, absclutely none, that the Georgia bar examination in whole or in part, is not designed to test the knowledge and ability which is fundamental to the practice of law. Petitioners offered no evidence, absolutely none, that the passing score on the Georgia bar examination, in whole or in part, is not fairly, substantively, and consistently set at a level which fairly, substantively, and consistently reflects minimum competence. On the contrary, petitioners' stipulated that the Georgia bar examination does test legal knowledge. Nor did petitioners offer any evidence that any procedure employed by the Georgia bar examination or that the examination itself had any identifiable racially disproportionate impact.

In sum, against overwhelming and uncontradicted evidence that the Georgia bar examination properly measured the knowledge and ability it is designed to measure; that the knowledge and ability measured is essential to minimal ability to engage in the practice of law, and thus that the examination in testing parlance possesses "content validity", petitioners offered nothing.

Instead, relying on general assertions of disproportionate failures by black applicants which were never related to the issues of this case and were never in their breadth substantiated, petitioners chose to turn this contest on the proper phrasings of the legal standard which the Georgia bar examination must satisfy to overcome the generalized and unrelated assertion of disproportionate impact. Each suggested phrasing of the legal standard was concurrently designed to avoid for petitioners any burden of showing that the present examination is deficient in theory or in administration, any burden of showing that the asserted disproportionate impact is related to the theory or administration of the examination, any burden of showing that facially absurd suggested alternatives are available, or any burden of showing that those alternatives would avoid the asserted disproportionate impact. The court of appeals properly rejected petitioners' suggested legal standards.

In evaluating petitioners claims, it is important to note what the district court and Court of Appeals did not hold.

Contrary to the petitioners' contorted reading of the decisions, neither the district court nor the court of appeals in this case, each of which examined the bar examinations in issue, held only that the Georgia bar examination had only an "apparent" or "facial" relationship to "'some aspects' of one part of the job." Petition for Certiorari, p. 10. Neither court in any way suggested that a licensing examination passes scrutiny under the Fourteenth Amendment merely by stating a rational theory to support it or because the test "appeared to relate" to knowledge required of lawyers.*

On the contrary, the district court and the Court of Appeals, after examination of the procedures employed, all other evidence, and the examinations at issue, properly held as a matter of law that the Georgia bar examinations

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* Contrary to petitioners' suggestion that their testing expert could determine "content validity", the validity of an examination's content and the requisite knowledge for entry into a field is established by experts in the field being tested, in this case lawyers and judges, not by psychologists, just as the validity of the content of an examination in medicine is established by medical experts. The patent expertise of the Bar Examiners or the drafting committees for the MBE has never been contested by petitioners.

before it did in theory and in fact possess a rational, obvious connection with an applicant's fitness to practice law and did in theory and in fact test skills and knowledge which have a logical, obvious relationship to those both "necessary" and "fundamental" to the practice of law. 14a, 30a-31a. That holding is that a "fair and substantial" relationship does exist between the test, as administered, and knowledge and ability "essential" and "fundamental" to the practice of law.

In the court's judgment, as in the unanimous judgment of the Georgia bar examiners, the bar examiners of all other jurisdictions which are members of the National Conference of Bar Examiners, and the courts and legislatures of those jurisdictions, an applicant has not demonstrated competence to practice law unless he has demonstrated that basic knowledge and ability. The Georgia bar examination, as designed and administered, measures that knowledge and ability. The Georgia bar examination, the court of appeals held, is demonstrably a reasonable measure of knowledge and abilities fundamental to minimal competence in the practice of law.

In that context, petitioners' suggestions that the Fourteenth Amendment borrow for this case Title VII concepts of criterion validation of the test by correlation of test results with actual job performance or by content validation of comparison of the ele-

ments of the test with a "comprehensive" analysis of job performance are practically and legally specious.

The Georgia bar examination is not designed and is not held out as predictive of competent, much less successful, performance as a lawyer, except indirectly by determining the applicant's claim to basic knowledge and basic skills essential to entry into that profession. The Fourteenth Amendment does not require otherwise. Nor is the Georgia bar examination designed or held out as determinative of an applicant's present competence in all or even substantially all potential endeavors which he might undertake as a lawyer, except indirectly by determining the applicant's claim of basic knowledge and basic skills essential to entry into the profession. The Fourteenth Amendment does not require otherwise.

As the court of appeals noted below, 9a, contrary to petitioners' suggestion, no court has ever incorporated wholesale Title VII standards into the Fourteenth Amendment for purpose of evaluating public employment practices, much less State professional licensing procedures. As the court of appeals noted below, Title VII concepts and methods of analysis may indeed to some extent furnish useful tools and suggest standards for evaluating public employment practices for purposes of the Fourteenth Amendment. At least there, however, the subject matter to which Title VII is applicable and the purpose of that statute are also to some extent involved in the Fourteenth

Amendment evaluation. With respect to a licensing scheme designed to exclude unless minimal competence immediately essential to the profession is demonstrated, Title VII concepts and methods of analysis have absolutely no practical or legal bearing whatsoever, and even a cursory reading of the statute and the decisions cited below will amply demonstrate that fact. No decision holds the contrary.

On the other hand, every reported decision involving issues comparable those that involved here, each of which was cited and relied upon by the court of appeals here, has taken the tact mandated by this Court in Schware v. Board of Examiners, 353 U.S. 232 (1957). The Fourteenth Amendment requires that the Georgia bar examination, in theory and as administered, bear a fair and substantial relationship to an applicant's fitness to practice law. If it does, then any fortuitous disproportionate impact on some blacks, which is all that is involved here, is immaterial.

In sum, the respondent Bar Examiners met the burden assumed by their motion for summary judgment. The voluminous record amply demonstrates by inclusion of overwhelming supportive evidence and by the absence of any contrary evidence, after almost two years of intensive and extensive discovery by petitioners, that

Georgia bar examination and the procedures employed in preparing, administering, and grading the examination, have a fair and substantial relationship to an applicant's fitness to practice law in that the examination is designed to and does measure whether an applicant possesses basic knowledge and skills which are essential and fundamental to minimal competence to practice law. That is all that the Fourteenth Amendment requires, even if an adverse impact on some black applicants had been demonstrated.

2. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE RESPONDENTS HAD MET THEIR BURDEN OF DISPROVING RACIAL DISCRIMINATION.

Contrary to petitioners' misreading of the opinions of the court of appeals and the district court, neither in evaluating respondents' motion for summary judgment initially imposed on petitioners any burden at all on the petitioners' claim that respondents had intentionally failed black applicants because they were black. Petitioners' many variations on the theme of whether they established a prima facie case are out of tune with this case. As each court approached the issue, the burden was initially on respondents to negate any genuine issue as to any fact material to that claim. In the judgment of each court, respondents met that burden and the burden properly then shifted to petitioners to establish a genuine issue. It was at that point that petitioners failed.

The respondents fully recognize the heavy burden they assumed in seeking summary judgment on this serious issue. The uncontradicted evidence contained in the voluminous record, however, fully met that burden.

The rigorous procedures mandated by the Georgia Supreme Court governing the administration and grading of the bar examination are scrupulously designed to insure anonymity of each examinee until grading is complete. The evidence offered in support of respondents'motion for summary judgment exhaustively demonstrated that the Board and their "agents," consisting of an administrative assistant and a secretary, fully complied with those rules and that no board member in fact ever learned the identity of any examinee until after the grading had been completed and no board member ever intentionally discriminated or could have done so had he desired. No information which would enable a Bar Examiner to identify an examinee or to ascertain his race was available to or was made available to any examiner until after the grading process was complete. As petitioners point out, "not all possible witnesses" testified in this issue. However, the one who did not, the Board's secretary, was available to but unsought by petitioners either in the year which preceded the filing of respondents' motion or in the six months which intervened between its filing and its disposition. Moreover, the testimony of all other witnesses exhaustively dealt with the potential knowledge of that witness and exhaustively demonstrated that the Board and its two "agents" had rigorously followed the rules of the Supreme Court

of Georgia and the Board members had not in fact learned the identity of any examinee or any aspect of identity, including race, prior to the completion of the grading process. The evidence also demonstrated the impossibility of a board of examiners setting a passing score on the MBE so as to exclude blacks by design.

That evidence, the district court and court of appeals properly concluded, met the respondents' burden. Neither held, however, that that testimony was entitled to "unquestioned belief" or that it "conclusively precluded" the issue. Each did hold that that evidence required petitioners to present evidence demonstrating that a genuine issue of fact existed.

Petitioners, however, asserted and continue to assert only 1) that their general proposition that the bar examination had a disproportionate impact on black applicants entitled them to trial, and 2) that they were entitled to a trial on the motives and credibility of the witnesses against them. Patently, neither assertion is sufficient. Adverse racial impact, even if the general assertion by petitioners established it, does not independently establish any genuine issue of fact when the opportunity to achieve that result by design is totally negated and there is a total absence of any evidence suggesting a design to do so. Moreover, absent evidence which establishes an issue as to motive or credibility, obviously motive and credibility are not in issue. Petitioners, despite

exhaustive efforts over almost two years, produced none.

Both the district court and court of appeals properly placed the initial burden on respondents to negate any genuine issue with respect to any fact material to the charge of intentional racial discrimination. Respondents clearly met that burden. Petitioners, the lower courts correctly concluded, utterly failed to meet their resulting burden of establishing a genuine issue. Neither court established any novel theory of F.R. Civ. P. 56 or of a plaintiff's position in a civil rights case founded on a charge of racial discrimination.

3. THE PROCEDURAL REQUISITES OF THE DUE PROCESS CLAUSE ARE MET IN THE CONTEXT OF A BAR EXAMINATION BY THE EXISTENCE OF STATE PROVIDED REMEDIES TO CORRECT UNLAWFUL USE OR GROSS ABUSE OF DISCRETION BY THE BAR EXAMINERS.

State law correctly presumes that the Board of Bar Examiners properly utilize the discretion vested in them. As the court of appeals noted, federal courts must observe a comparable presumption.

The Due Process Clause of the Fourteenth Amendment does not require that the assignment of a failing grade on a bar examination be preceded or followed by formal or informal notice and opportunity for hearing to contest the judgment of the Bar Examiners in assigning that grade. A final judgment in this context must ultimately rest on the content of the examination paper itself, not on extraneous matter which might be offered in a hearing, and nothing in the Due Process Clause requires that a State require repitition of the process of judgment once finally made or the ultimate placement of that judgment in some instrumentality other than the instrumentality which first makes it. Respondents do not agree with the Court of Appeals that the due process clause imposes any procedural requisites on such a process and particularly disagree that any constitutionally significant stigma exists to prompt such requirements. See Paul v. Davis, 44 U.S.L.W. 4437 (No. 74-891, decided March 23, 1976). Indeed, the Court of Appeals appears now to agree. See Mahavongsanan v. Hall, ___ F.2d ___ (5th Cir. No. 75-3146, decided March 26, 1976).

Respondents do agree that the Due Process Clause prohibits a State from giving force to such a judgment which is demonstrated to be illegal or arbitrary or capricious. To maintain its presumption that the Board of Bar Examiners will fairly and conscientiously discharge the duties of their offices, but to remedy the unlikely event of an illegal or grossly abusive discharge of their power, State law provides, after the fact of a final judgment of

the bar examiners, a remedy to a failed applicant by mandamus. 52a; McMichen v. State Board of Bar Examiners, 305 F. Supp. 1221 (N.D. Ga. 1969). Under that remedy an applicant may contest any illegal use or gross abuse of the discretion vested in the Board of Bar Examiners; but an applicant may not otherwise seek a substitution of a court judgment for the Board's initial judgment. The Fourteenth Amendment does not require more.

CONCLUSION

This case, narrowed to its real contours by the voluminous record below and by a proper understanding of the opinions below, presents no issues warranting review by this Court. No novel issues are presented and no conflicts exist between the judgment below and the decisions of this Court or any other court of appeals. On the contrary, while serious issues are presented, the court of appeals correctly followed prior decisions of this Court and pertinent decisions of other courts of appeals. It correctly determined that there was no factual foundation for the petitioners serious charge of intentional discrimination. That foundation did not exist because Georgia does not discriminate on the basis of race in the administration of its bar examination.

On this voluminous record before it, the court of appeals also correctly held, as a matter of law, that Georgia's bar

examination did in theory and in fact measure basic knowledge and skills which are essential to the practice of law and in theory and in fact is designed to exclude only those who did not demonstrate minimal competence in these essentials. In holding that such a test met Fourteenth Amendments standards even assuming it had adverse impact on some black applicants, the court of appeals correctly relied on prior decisions of this Court which establish the States' power to design prerequisites to admission to the practice of law which, as long as the requisites bear a rational relationship to fitness to practice, do not violate the Fourteenth Amendment. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Timothy J. Sweeney, one of the attorneys for the Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this date three copies of Respondents' Brief in Opposition were properly mailed, first class postage prepaid, to each of the following:

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I further certify that all parties required to be served have been served.

This _____ day of _____, 1976.

_____
TIMOTHY J. SWEENEY
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